Supreme Court of the United States

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OCTOBER TERM 1974

No. 74-549

ALLIED PILOTS ASSOCIATION, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, *et al., Petitioners,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC., *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS AMERICAN AIRLINES, INC., ET AL., IN OPPOSITION

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	13

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS:

Airlines Mutual Aid Agreement, Order 73-2-110, Feb. 27, 1973 4
Airlines Mutual Aid Pact, Order 70-7-114, July 23, 1970 4
Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964) .. 3
Six-Carrier Mutual Aid Pact, 29 C.A.B. 168 (1959) .. 3, 5

COURT DECISIONS:

Brotherhood of Railway Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966) 11
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 7
Kennedy v. Long Island R.R., 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) 5, 7, 8
NLRB v. Brown, 380 U.S. 278 (1965) 11
NLRB v. Great Atlantic & Pacific Tea Co., 340 F.2d 690 (2d Cir. 1965) 11
NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957) 11
Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 7

STATUTES:

Federal Aviation Act:

§ 401(k)(4) (49 U.S.C. § 1371(k)(4)) 5
§ 412 (49 U.S.C. § 1382) 2, 4, 5, 8
§ 414 (49 U.S.C. § 1384) 7
§ 1006(e) (49 U.S.C. § 1486(e)) 7

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QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming a Civil Aeronautics Board decision that an agreement among airlines for payments to participants

whose operations were shut down as a result of strikes does not violate the Railway Labor Act and is not adverse to the public interest.

STATEMENT

In 1958 several certificated airlines formed an agreement, thereafter known as the "Mutual Aid" agreement, to afford financial protection to a participating airline whose operations were shut down as a result of a strike. Since its inception over 15 years ago, the agreement has been invoked in a number of strike cases, including some where the struck airline's continued viability was gravely jeopardized by the strike. Although no airline has ever been better off financially as a result of a strike with Mutual Aid payments than it would have been without the strike, Mutual Aid payments have reduced the damage inflicted by strikes on companies in an industry which, because of its heavy passenger service orientation, is highly vulnerable to strike damage.[1]

The Mutual Aid agreement is among those categories of inter-carrier agreements subject to section 412 of the Federal Aviation Act (49 U.S.C. § 1382) requiring that air carrier agreements be submitted to the CAB for approval or disapproval. The Board is required to approve those agreements that it finds do not violate the Federal Aviation Act and are not adverse to the public interest.

The original Mutual Aid agreement was submitted to the CAB in November 1958 and approved for one

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[1] In addition to damage suffered during the pendency of a strike, an airline typically sustains continuing financial losses for a considerable time after the end of a strike, when it is attempting to regain its lost traffic and recover its market position. *See* App. xv-xvi. No Mutual Aid is paid after the strike ends.

year over airline union objections after an extensive oral argument. *Six-Carrier Mutual Aid Pact,* 29 C.A.B. 168 (1959) (App. 5a).[2] This conclusion was affirmed on reconsideration. 30 C.A.B. 90 (1959) (App. 35a). In October 1959 the carriers extended the agreement for an additional period and in March 1960 adopted amendments broadening its coverage, as a result of which four additional carriers joined the agreement.[3] In response to new objections from airline unions, the Board instituted a formal investigation of the agreement and the amendments. 31 C.A.B. 977 (1960) (App. 41a). During the ensuing proceeding the agreement was again amended,[4] and these amendments were included in the investigation. The investigation employed all of the procedures of a formal evidentiary hearing and at its conclusion the Board approved the agreement, as amended, for a three-year period. *Mutual Aid Pact Investigation,* 40 C.A.B. 559 (1964) (App. 44a).

In 1967 the airlines requested that the CAB's approval of the agreement be extended indefinitely. Again, the unions objected and again the CAB set down a formal proceeding in order to have a full record on which to base its decision. (CAB Order E-26,000, Nov. 17, 1967) (App. 134a). This proceeding eventuated in a Board order approving the agreement

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[2] References to "App. —" refer to the Appendix to the petitions in numbers 74-709 and 74-710.

[3] These amendments broadened the categories of strikes covered by the agreement.

[4] The principal change effected by these amendments was to add provisions to assure a specified minimum level of payments to a struck carrier, subject to an annual limit on each paying carrier's liability.

in 1970 for an indefinite period. *Airlines Mutual Aid Pact*, Order 70-7-114, July 23, 1970 (App. 142a). The agreement had been amended again in late 1969.[5] The 1970 approval order also approved these amendments, but in response to a union petition for reconsideration the Board reopened the proceeding for further hearings on the new amendments. (App. 221a). This last proceeding led to the Board's order of 1973 approving the agreement including the latest amendments for five years. *Airlines Mutual Aid Agreement*, Order 73-2-110, Feb. 27, 1973 (App. 225a). In late 1970 the agreement had been again changed to broaden the class of carriers eligible for membership.[6] This change was also included in the subsequent proceeding and was encompassed within the 1973 approval order.

Airline unions, although not generally subject to the jurisdiction of the CAB and without any regulatory agency impediments to their use of economic power in collective bargaining, have participated in all of the CAB proceedings on the Mutual Aid agreement and have consistently opposed approval.[7] Several of these unions sought review of the 1970 and 1973 orders of the CAB. The Court of Appeals, consisting of Chief Judge Bazelon and Judges MacKinnon and Christen-

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[5] These amendments increased the minimum level of payments assured to a struck carrier, increased the limit on each carrier's annual liability for payments, and revised the provisions on joining and withdrawing from the agreement.

[6] The agreement had been confined to certificated trunkline carriers. The 1970 amendment opened the agreement to certificated local service carriers.

[7] There is no statutory requirement of a hearing prior to approval under section 412 of the Federal Aviation Act; the oral argument in 1959 and three subsequent evidentiary hearings were held at the behest of the airline labor unions.

sen, affirmed the Board in all respects. Chief Judge Bazelon's opinion for the unanimous court recognized that the Board's task involved labor relations as well as transportation considerations, and that its judgment had to be consistent with the national labor policy, which contemplates the resort by employers and unions to self-help if established procedures for resolution of disputes have been exhausted without settlements. The Court held that the Board had properly assessed the national labor policy and correctly applied it to approve the Mutual Aid agreement. (App. viii-x). It also upheld the Board's conclusion that the agreement did not violate the Railway Labor Act,[8] relying on a like holding by the Second Circuit Court of Appeals involving a similar strike payments arrangement in the railroad industry. *Kennedy* v. *Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) (App. ix-x).

On the public interest issue, the Court noted that the Board had considered the impact of the agreement on employee welfare in three separate evidentiary proceedings. Although the Board advanced several grounds for finding the agreement consistent with the public interest from the standpoint of employee welfare, Judge Bazelon's opinion found sufficient to sus-

[8] Section 412 of the Federal Aviation Act (49 U.S.C. § 1382) requires for approval of an agreement that the Board find no violation of the Federal Aviation Act. Because section 401(k)(4) of the Act (49 U.S.C. § 1371(k)(4) makes continued compliance with the Railway Labor Act a condition of holding a certificate, the Board has construed the required section 412 finding as encompassing adherence to the Railway Labor Act wherever the Act is in issue. *See* Six-Carrier Mutual Aid Pact, 29 C.A.B. at 170 (App. 7a). Apart from the Railway Labor Act contentions, there is no issue in this case as to violation of the Federal Aviation Act.

tain approval the Board's conclusion, undisputed by the unions, that

> "the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement. Thus, the record shows that air carrier wages . . . are higher than, and . . . have increased faster than, wages in other industries, including other transportation industries." (App. xiii).

The Court also sustained the Board's findings, in support of its conclusion, that the airlines, as a service industry unable to stockpile services and heavily dependent on passenger transport, are particularly vulnerable to strikes and thus have substantial need for financial protection from strike damage. It upheld the Board's finding that the agreement would not seriously reduce airline incentive to settle disputes, which finding had been based on the relative infrequency of strikes in recent years, the heavy cost of strikes even with Mutual Aid, and the other financial pressures on carriers to settle disputes with unions. The Court also agreed with the Board's view that the agreement did not adversely affect the financial viability of participating airlines, and that weaker carriers, which had the most to lose from a strike, were not disadvantaged by participating. (App. xiii-xvii).

The three certiorari petitions seek review of the Court of Appeals decision.

REASONS FOR DENYING THE WRIT

No reasons have been advanced that would warrant Supreme Court review of this straightforward regulatory agency review case. Neither the case nor the decision below raises any novel or unusual questions.

There is no issue of statutory interpretation, but rather only the application of well-understood principles to the particular facts. The decision below is fully consistent with decisions of this and other courts. Certiorari should be denied.

1. None of the petitions makes a showing, as contemplated by Rule 19, of considerations that would warrant the exercise of discretionary certiorari review. Only the Air Line Pilots Association, International (ALPA), even attempts such a showing, and it merely argues that the decision below was incorrect and that it affects virtually the entire airline industry. ALPA Pet., pp. 11-13. This does not suffice to meet the burden of a petitioner seeking review of a unanimous decision by a Court of Appeals especially experienced in overseeing the kind of regulatory action involved in this case.

The decision below is not claimed to be in conflict with any decision of this Court or any court of appeals.[9] The closest case in point, *Kennedy* v. *Long*

[9] ALPA asserts without amplification that "the Board holds that it has power to exempt the Pact from the antitrust laws, contrary to the rulings in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)." ALPA Pet., p. 12. It is a fact that, pursuant to section 414 of the Federal Aviation Act (49 U.S.C. § 1384), the effect of the Board's approval of the Mutual Aid agreement is to confer antitrust immunity with respect to its implementation. The *Pan American* and *Hughes* cases did not involve CAB action which invoked section 414 and have nothing to do with this case. In any event, the court below declined to consider ALPA's antitrust contentions because they had not been presented to the agency. (App. xi). *And see* Federal Aviation Act § 1006(e), 49 U.S.C. § 1486(e). This ground alone is sufficient to dispose of the antitrust arguments contained in ALPA's certiorari petition (pp. 29-30). The other petitioners have not advanced antitrust arguments in either the court below or their petitions to this Court.

Island R.R., 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), which upheld the railroad strike insurance arrangement against challenge based on the Railway Labor Act, Interstate Commerce Act and antitrust laws, is fully consistent with the decision below. Moreover, there is no substantial question of statutory interpretation raised in this case. There is little if any disagreement as to the meaning of the applicable provisions of the Railway Labor Act; the only dispute is whether the facts of this case make out a transgression of those provisions. The court below applied conventional standards of review, carefully analyzing the conclusions of the CAB and assuring itself that the Board's findings rested on a sufficient evidentiary basis. In sum, there is nothing to distinguish this case from scores of other appellate court reviews of regulatory agency actions, and nothing to warrant the Court in selecting this case for further review.

2. Pursuant to section 412 of the Federal Aviation Act (49 U.S.C. § 1382), the Board determined that the Mutual Aid agreement was not adverse to the public interest. Each of the union petitions contains arguments on the public interest issue which, for the most part, were considered and rejected by the Board and the Court of Appeals.

The Air Line Dispatchers' Association, *et al* (ALDA), repeat their major argument below—that the Board applied an incorrect standard in deciding the public interest question. According to ALDA, the Board approved the Mutual Aid agreement because it strengthened the bargaining power of airlines vis-a-vis unions. ALDA Pet., p. 11. This is incorrect. The Board's judgment of approval was based on its conclusions, set out in its 1970 approval order and re-

affirmed in its 1973 order, that the agreement was consistent with national labor policy and furthered the public interest by spreading the severe burden of strike losses, but was without significant adverse impact on collective bargaining, and in particular was not the cause of lengthened service interruptions. *See* App. 145a-150a, 154a-155a, 181a-197a, 228a-233a. The Board went on to deal with *union* contentions, to some extent mirrored in the Administrative Law Judge's 1972 Initial Decision, that the agreement should be disapproved because it improved the bargaining position of the airlines. The Board rejected this claim, concluding that this effect alone, even if true, would not warrant a finding that the agreement was adverse to the public interest. In this context the Board emphasized the great pressures on airlines, financial and other, to settle a strike dispute, even where Mutual Aid is available. (App. 232a-236a, 249a-251a). Far from constituting application of an improper standard, the Board's reasoning was fully consistent with controlling law and soundly grounded in the record. The Court of Appeals had no difficulty in sustaining this aspect of the Board's decision (App. xiii-xvi).

ALDA says the Board erred in allowing "financially weak" carriers to decide for themselves whether to join the agreement. ALDA Pet., pp. 14-16. The court below considered this contention at length and concluded that the Board's findings, contrary to those urged by ALDA, were "reasonable" and "adequately supported." (App. xvi-xvii). ALDA's petition alludes to the court's treatment of the issue but does not demonstrate that it was incorrect. ALDA Pet., p. 16. [10]

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[10] ALDA has suggested that action on the petitions in this case be deferred pending action on possible petitions in another CAB

(Footnote Cont'd)

ALPA's "Point I" in the Argument portion of its petition contains a potpourri of public interest arguments it has advanced in the proceeding before the Board and the court below. Many were dealt with and explicitly rejected by the Court of Appeals; all are answered in the brief of the Trunkline Carrier Parties in the court below (pp. 36-47), and no purpose would be served by repeating the answers here. ALPA's contentions were found wanting by the CAB in its 1970 and 1973 orders and were likewise rejected by the Court of Appeals. It has not shown that still another round of review would produce a different result.

3. Both ALPA and the Allied Pilots Association (APA) argue that the Mutual Aid agreement is multi-employer economic activity which is impermissible except in the context of a multi-employer bargaining unit and only then where necessary to protect the integrity of that unit. ALPA Pet., pp. 25-27; APA Pet., pp. 12-14.[11] The three cases cited for this prop-

review case, involving the formation of the Airlines Industrial Relations Conference which was approved by the Board subject to substantial modification of the Articles of Association. Since the filing of ALDA's petition, the Court of Appeals for the District of Columbia Circuit has entered an order affirming without opinion the CAB's approval of the Conference. The issues in that case are not the same as those raised in this case, and the unions at no time have sought consolidation of the two proceedings, either at the Board or court level. Thus, there is no reason for the Court to delay action on the certiorari petitions in this case.

[11] APA advances this argument as part of a broader point that the CAB may not approve Mutual Aid because the agreement did not exist in 1936 when the Railway Labor Act was extended to the airline industry. APA Pet., p. 11. The sole support for this extraordinary contention is an extensive review of the legislative history of the Railway Labor Act of 1926, not advanced before the Board or the Court of Appeals, which is apparently designed to show that that statute was a cooperative effort by railroad management and labor. While this may be so, it does not follow that

(Footnote Cont'd)

osition demonstrably do not support it. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), and *NLRB* v. *Brown*, 380 U.S. 278 (1965), though sustaining multiple employer lockouts in a multi-employer bargaining situation, neither stated nor intimated that the activity was limited to such situations. *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2d Cir. 1965), held only that employers could not, through joint lockout action, force a union to engage in multi-employer bargaining. As the court below ruled, the Mutual Aid agreement does not have this tendency, and the *A&P* decision does not undermine the Second Circuit Court's earlier holding in the *Kennedy* case sustaining multi-employer financial action in the context of individual employer bargaining.[12] (App. ix-x).

ALPA and APA also cite *Brotherhood of Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966), as standing for the principle that a carrier's right of self-help under the Railway Labor Act is "strictly limited" and that "any carrier self-help which has the

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unions and employers must be confined in their collective bargaining techniques and strategies to those in existence when the statute was enacted, or when it was made applicable to the airline industry. The Act contains broad guidelines for the conduct of labor relations in the industries to which it applies; within those guidelines there is substantial room for self-help. The court below recognized this broad scope for self-help, and found on abundant evidence that the Mutual Aid agreement did not contravene the provisons or policies of the statute. (App. viii-x). APA does not advance any grounds that would warrant review of this determination.

[12] Judge (now Chief Judge) Kaufman was the author of both the *Kennedy* and the *A&P* case opinions. There is no suggestion in his opinion in the *A&P* case of any intention to recede from the strong position in favor of the legality of mutual employer financial assistance announced in the *Kennedy* case.

effect of prolonging interruption of regular service is inconsistent with the Railway Labor Act." ALPA Pet., p. 27; APA Pet., pp. 14-15. It is claimed that the effect of the Mutual Aid agreement is to prolong and broaden strikes and to give carriers an incentive to resist settlements. The Board found that the agreement did not have these effects and the Court of Appeals sustained this finding as amply supported by the record. (App. xiv-xvi). Beyond this, the unions' reading of the *Florida East Coast* case is incorrect. As the court below held, *Florida East Coast* permits a carrier, in certain circumstances, to alter the terms and conditions of the collective bargaining agreement with a striking union without following the usual statutory bargaining procedures. This is an exception to the normal requirement of exhaustion of the Act's procedures before self help may be invoked, and was warranted by the public interest in maintenance of service during a strike. (App. x, n. 12). This decision in no way limits the right of self-help after the exhaustion of the Act's bargaining procedures, as the unions have argued. [13]

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[13] APA also contends that the CAB should have disapproved the application of Mutual Aid in the context of a strike by a union, such as APA, with representation rights on only one airline. The Board considered and rejected this proposal (App. 204a, 205a, 145a) and its decision was clearly correct. The purpose of Mutual Aid is to provide some financial protection to offset the severe damage suffered by a struck carrier. That damage is equally severe whether or not the striking union also represents employees on other airlines. APA's argument rests on the erroneous premise that the CAB approved the agreement only because of a concern for the overwhelming strength of unions with multi-carrier representation. This was not the basis of the Board's decision, and APA has advanced no public interest argument as to why a carrier that suffers damage from a strike by a single-carrier union should not have the partially offsetting financial protection of Mutual Aid.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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